In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 923

JAMES LEE HILGENECK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1969 (Pet. App. A). The petition for a writ of certiorari was filed on December 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where a local draft board determined that petitioner should be assigned to civilian work as a conscientious objector (I–O) and sought approval from the National Director of Selective Service, a subsequent order to report for such work was invalid

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because it was signed and mailed by the clerk upon receipt of the Director's approval, without a further order by the local board.

2. Whether the trial judge was required to disqualify himself because he had a son in military service in Vietnam.

3. Whether an order for a conscientious objector to report for civilian work in lieu of induction constitutes involuntary servitude in violation of the 13th Amendment.

REGULATIONS INVOLVED

32 C.F.R. 1660.20 provides:

* * * * *

> (c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for that purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. * * *
>
> (d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work * * *.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan petitioner

was convicted of having violated 50 U.S.C. App. 462 by failing to comply with an order of the local board to report for civilian work at the University Hospital Medical Center, Ann Arbor, Michigan (R. 1, 13). On September 18, 1968 he was sentenced to imprisonment for a period of five years subject to parole at any time under the provisions of 18 U.S.C. 4208(a)(2) (R. 23). The court of appeals affirmed the conviction (Pet. App. A).

The trial testimony and petitioner's Selective Service file, introduced in evidence as Gov. Ex. 1 (Tr. 32),[1] show that petitioner, a Jehovah's Witness, was classified 1-O (F. 10). After being notified of this classification, petitioner informed the local board he would not accept any civilian work (F. 10, 54; Tr. 64-65).

On April 27, 1966, pursuant to 32 C.F.R. 1660.20(c), the local board, petitioner, and a representative of the State Director held a meeting for the purpose of reaching an agreement as to the type of civilian work petitioner would accept. Petitioner continued his refusal to accept civilian employment. It was then "unanimously agreed by the board members present and the State Director's representative that the registrant be assigned to work of national importance as a hospital worker and that it would be appropriate for him to perform this work at University Hospital Medical Center, Ann Arbor" (F. 67). On May 26, 1966, pursuant to 32 C.F.R. 1660.20(d), the State Director

[1] "Tr." refers to the 259-page transcript of the trial testimony which is on file before this Court. "F." refers to petitioner's Selective Service file, which we have numbered in pencil in the lower right hand corner of the pages and have lodged with the Clerk of this Court.

requested approval by the National Director of Selective Service of the local board's decision to assign petitioner to this civilian work (F. 69; Tr. 66). On June 8, 1966 the National Director approved the issuance of such an order (F. 70; Tr. 67). On August 11, 1966 the local board received authorization for this order from the State Director (F. 71; Tr. 36). On the following day (August 12), without a further meeting by the local board, the clerk of the local board signed and mailed to petitioner the order to report to the local board on August 23, 1966 for instructions to proceed to the place of employment (F. 10, 72; Tr. 33–34, 36, 81–83). Petitioner testified on his own behalf that he received this order, but that he did not report to the local board or to the hospital since he was entitled to classification as a minister (Tr. 160–161).

ARGUMENT

1. Petitioner contends that he was denied procedural due process since strict compliance with 32 C.F.R. 1660.20(d) required the local board, subsequent to its original authorization of civilian hospital work, to meet again and issue an additional order that he report for such work (Pet. 5–8). There is no substance to this technical contention.

Petitioner's reliance upon *Brede* v. *United States*, 396 F. 2d 155 (C.A. 9), as modified, 400 F. 2d 599, is misplaced. While *Brede* had originally held that, in order to comply with Section 1660.20(d), the local board had to meet again *after* receiving authorization from the National Director of Selective Service, and order the objector to report for such work, the modi-

fied decision held that the direction to report could be entered prior to authorization but subject to subsequent authorization and notice. Very recently, the Ninth Circuit, *en banc,* further restricted the *Brede* holding by finding it sufficient that a local board designate the type of employment and the employer prior to and subject to the National Director's authorization. *United States* v. *Stark,* set out in the Appendix, *infra.* Accord, *United States* v. *Isenring,* No. 17,486, C.A. 7, decided December 17, 1969.

The facts here are identical. The local board determined on April 27, 1966, not only that petitioner should be assigned to hospital work, but also that he should perform this work at the University Hospital Medical Center, Ann Arbor, Michigan. This determination constituted a direction for an order to report for such work, subject to authorization by the National Director and notice. It was not necessary that the board meet again to reaffirm this order; the action of the clerk of the board in signing and mailing this order was no more than a ministerial implementation of it.[2] *Ibid;* see *Davis* v. *United States,* 402 F. 2d 513, 514 (C.A. 5), certiorari denied, 394 U.S. 908; *United States* v. *Crowley,* 405 F. 2d 400, 403–405 (C.A. 4), certiorari denied, 394 U.S. 904; *United States* v. *Boroski,* 412 F. 2d 668, 673 (C.A. 6).

2. In impaneling the jury the court asked if "any of you have any immediate relatives or have you yourself served on any Selective Service Board or have worked for any Selective Service Board?" (Tr. 13).

[2] There is no provision in 32 C.F.R. 1604.59 (Pet. 3) which expressly prohibits the clerk from signing and mailing an order of the board, as was done in the instant case.

All jurors responded negatively, but one stated that she had a son in the service (Tr. 13, 13–A). The court then asked: "If any of you do have any immediate members of your family in the military service or if you, yourself, have served in the military service, would that fact in any way prejudice you either for or against the defendant in this case?" The juror who said her son was in the service replied that it would (Tr. 13). After the court inquired of counsel on both sides as to whether there was any objection to excusing this juror for cause and both counsel said there was no objection, the juror was excused (Tr. 13–14). A second juror, who stated that his prior military service would prejudice him, was excused for cause after counsel for both sides said they had no objection (Tr. 14). A third juror volunteered that he had been in military service but would *not* be prejudiced, and was *not* struck (*Ibid.*). In denying a post-trial motion by petitioner to appeal *in forma pauperis* the court, in commenting that petitioner was able to work to pay his legal expenses, stated that petitioner "has no present duties which would not permit him to work like some others have who are presently, *like my son* in Viet Nam and others" (Pet. 10).

The fact that the court, with the consent of both sides, allowed jurors to be excused for cause when they stated that they would be prejudiced by their service connection does not show that the judge was biased because he had a son in Viet Nam. Considering the simple issue which should properly have been before the jury—whether petitioner did or did not report for civilian work—the judge allowed the defense

great latitude in presenting his defense. While two members of the court of appeals thought the sentence severe, eligibility for parole was permitted at any time the parole board should determine. In any event, as the court of appeals pointed out, the district court will have an opportunity to consider reduction of the sentence if request is made under Rule 35, F.R. Crim. P. (Pet. App. A, 2).

3. Petitioner's contention that an order to report for civilian work in lieu of induction violates the Thirteenth Amendment (Pet. 12–16) has been consistently rejected. See *e.g., Badger* v. *United States,* 322 F. 2d 902, 908 (C.A. 9), certiorari denied, 376 U.S. 914; *United States* v *Holmes,* 387 F. 2d 781, 784 (C.A. 7), certiorari denied, 391 U.S. 936; *United States* v. *Fallon,* 407 F. 2d 621, 624 (C.A. 7), certiorari denied, 395 U.S. 908; *United States* v. *Boroski,* 412 F. 2d 668, 673 (C.A. 6). See also *Selective Draft Law Cases,* 245 U.S. 366; *United States* v. *Chandler,* 403 F. 2d 531 (C.A. 4).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1970.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22,994

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

BERT DANIEL STARK, DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before Chambers, Barnes, Hamley, Merrill, Koelsch, Browning, Duniway, Ely, Carter, Hufstedler, Wright, Kilkenny and Trask, Circuit Judges.

Merrill, Circuit Judge:

Appellant, classified I–O by his local draft board, stands convicted of failure to report for civilian work in lieu of induction into the military service. Upon appeal he asserts that no order to report was ever made by the board; that the only order issued was one by the clerk of the board and that the record is silent as to her authority. Appellant relies on *Brede* v. *United States*, 396 F. 2d 155, 400 F. 2d 599 (9th Cir. 1968). The United States suggests that *Brede* should be re-examined. The court has taken the appeal in banc for that purpose.

In *Brede* we recited the Government's contention as follows:

> The United States contends that under universal administrative construction of § 1660.20 (d), and universal administrative practice, a determination that certain work is appropriate constitutes an implied order to report for such work, subject to authorization of the National Director and notice. Consequently at the meeting of March 14, 1966, an agreement as to work was reached and an implied conditional order to report was entered and the action of the clerk of the board was no more than ministerial implementation of the order.

We then noted:

> The Government's contention may have merit in an appropriate case. Here, however, the record is silent as to administrative construction and practice, or as to any understanding of the board in such respects from which it might be found that the critical exercise of administrative judgment had been made. 400 F. 2d at page 600.

The same situation exists in this case [as in Brede]. Nevertheless we are of the view, and so hold, that where, as here (and in *Brede*), the board's determination includes not only the type of employment deemed appropriate but also the employer to whom the registrant is to report, the critical exercise of administrative judgment by the board has been made and an order to report to the specified employer (subject to authorization of the National Director) is implicit and the action of the clerk in issuing the order is merely ministerial implementation. To this extent *Brede* is hereby overruled.

Accordingly we find no error in the ruling of the District Court (prior to our holding in *Brede*), to this effect.

Other assignments of error we find to be without merit. The nature of appellant's representation by counsel at the time of trial was not such as to constitute inadequate representation. We find no prejudicial misconduct on the part of the district judge. Appellant knowingly failed to report for the assigned work and the requisite criminal intent was thus present. *Smith* v. *United States*, 391 F. 2d 543 (8th Cir. 1968). Failure to give full warnings as to appellant's constitutional rights and privileges at the meeting called for the purpose of determining appropriate employment was not contrary to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Appellant was not then in custody; no crime had yet been committed. *United States* v. *Dicks*, 392 F. 2d 524 (4th Cir. 1968); *Noland* v. *United States*, 380 F. 2d 1016 (10th Cir. 1967).

Judgment affirmed.

Dated November 28, 1969.

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